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No. 948

IN THE

Supreme Court of the United States

October Term, 1955

R. I. McCLANAHAN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
Urged as Reason for Granting the Petition	2
To be Urged if Petition Granted	3
STATUTES INVOLVED	4
STATEMENT	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	17
APPENDIX A	19
APPENDIX B	20
APPENDIX C	33

LIST OF AUTHORITIES

CASES

Berger v. United States, 295 U.S. 78	15, 16
Bollenbach v. United States, 326 U.S. 606, 615	17
Corcoran v. United States, 229 Fed. 2d 295	10, 11
Freidus v. United States, 223 Fed. 2d 598	8, 9, 13
Hargrove v. United States, 67 Fed. 2d 820	11
Kotteakas v. United States, 328 U.S. 750	17
Krulewitch v. United States, 336 U.S. 440	17
McBride v. United States, 255 Fed. 2d 249	10
McNabb v. United States, 318 U.S. 332, 334, 341	15
Morrissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288	12, 14
Russell v. United States, 222 Fed. 2d 197	10
United States v. Murdock, 290 U.S. 389-391	9, 13
United States v. U. S. Gypsum Co., 333 U.S. 364	16
Wardlaw v. United States, 203 Fed. 2d 884	11

REVISED RULES OF THE SUPREME COURT

Rule 22(2)	2

UNITED STATES STATUTES

18 U.S.C.A. 2	3, 4
18 U.S.C.A. 371	4
18 U.S.C.A. 1001	2, 4, 9
28 U.S.C.A. 1254(1)	2
38 U.S.C.A. 715	4

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 16, 1956. A Motion for Rehearing duly filed was overruled on April 16, 1956.

Opinion Below

The majority opinion of the Court of Appeals, not yet reported, is found in the Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on March 16, 1956. Order of the Court of Appeals denying

a Petition for Rehearing was entered April 16, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and Rule 22(2) Revised Rules of the Supreme Court of the United States.

Questions Presented Urged as Reason for Granting the Petition

1. Whether criminal intent and guilty knowledge are elements of the offense in a prosecution of a defendant charged with "willfully and knowingly" *causing* others to present false statements to and to conceal material facts from an agency of the United States in violation of the False Statement Statute, Title 18 U.S.C.A. Sec. 1001.

2. Whether standards of procedure required in Federal criminal trials permit Government counsel to personally abuse a defendant in jury argument as a "profiteer", an "octopus" and as "the top dog"; to indict the defendant's former attorney with other parties charged with similar offenses, and then in jury argument to comment on the failure of the defendant to call the attorney as a witness in support of defendant's testimony and claim that he had not made or caused others to make false statements and that he had not acted willfully and knowingly, or dishonestly; Government counsel knowing that the attorney was under subpoena in attendance upon the trial under the rule, such comments being made after Government counsel had conferred with the attorney under indictment and had announced that he had decided not to call him as a witness for the Government; to comment during the trial in such a manner as to give testimony and personal opinions as to the acts of the defendant and to orally speculate about other evidence and reasons for the acts of the defendant

in a statement *addressed to the Court* in reply to an objection by defense counsel which placed such statement beyond reach of an objection, which statement constituted unsworn testimony; to depart from the function of interrogation of Defendant to affirmatively state to the Defendant and imply to the jury during the interrogation of defendant that the defendant had avoided a direct violation by staying "completely away from the paper work" as much as possible;

3. Whether a person charged specifically by indictment with the offense of causing others to present specific false statements to an agency of the United States is criminally liable as an accessory before the fact under Title 18 USCA Sec. 2, in the perpetration of these acts by a principal without knowledge on the part of the accessory of the making of the statements on the legal ground that "an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the *crime* that he advised or commanded, although such consequence may not have been intended by him", when the Government did not contend either by pleading or proof that the defendant had advocated the commission of another and a particular crime and the principal had *in the execution thereof* made the particular false statements the subject of indictment.

To Be Urged If Petition Granted

1. Whether an indictment which does not specifically define the false statement, the subject of the charge, is defective as not protecting against former jeopardy, and whether the counts of the indictment which failed to allege the "presentation" of false statements or the scheme states an offense under the False Statement Statute.

2. Whether or not Title 38 USCA Sec. 715 specifically condemning "knowingly" conspiring and making false statements to secure veterans benefits, is the exclusive statute by which the Government may reach false statements made to the Veterans' Administration by veterans in applications for guaranty insurance under the Servicemen's Readjustment Act of 1944.

3. Whether in a prosecution for making false statements and for a conspiracy, the defendant, pleading good faith and lack of evil intent, is entitled to an instruction to the jury that it may consider legal advice received upon the question of the honest understanding of the defendant and his lack of criminal intent.

4. Whether the standards of procedure and evidence required in Federal criminal trials in the light of modern conditions require that the Government be required to produce some evidence of the commission of the crime by a defendant in addition to the testimony of an alleged accomplice.

Statutes Involved

The statutory provisions involved are Title 18, USCA Sec. 2, 371 and 1001. They are printed in Appendix A.

Statement

Petitioner with two other parties was indicted upon a charge of causing other individuals to file false applications for guaranty insurance and false homestead affidavits with the Veterans' Administration allegedly forbidden by Title 18 USCA, Sec. 1001, and with covering up and causing to be covered up the fact that the veteran applicants did not intend to occupy the property to be insured. One de-

fendant was dismissed prior to trial and Petitioner and one Fitzhenry were tried upon the indictment which contained a conspiracy count. Fitzhenry, convicted on all counts, did not appeal. Petitioner, convicted on some of the counts, testified in his own behalf asserting that he had no criminal participation in any of the acts of Fitzhenry, his co-defendant, and Skinner, the associate of Fitzhenry, who was not indicted but was utilized as a witness against Fitzhenry. Petitioner's position was that, as a small salaried employee of the City of Houston, he had borrowed small amounts of money from time to time and invested such sums with Fitzhenry, a real estate broker and building contractor after having secured the opinion of an attorney skilled in such matters, and that he relied entirely upon the judgment of Fitzhenry in these matters which were beyond his competence, as an electrician and electrical inspector. He had no connection with the purchase of houses which had been insured but upon the advice and call of Fitzhenry, from time to time, furnished funds to Fitzhenry to purchase houses subject to the existing mortgage, insisting in each instance upon taking title in his own name, the title documents to which were recorded in the public records, and in the event of sale or other disposition he and Fitzhenry shared in the profits, if any. He denied any knowledge of the allegation of the Government that Skinner, the associate of Fitzhenry, and Fitzhenry were dealing with veterans who allegedly made false statements. The Government contended that when a veteran signed an application form of the Veterans' Administration for guaranty insurance reciting the purpose of the loan to be "To purchase a home" (in this exact verbiage), a false statement was made by the veteran at the instance of Fitzhenry and Skinner. Likewise, that when the loan was closed, that the

Homestead affidavit that the veteran executed also constituted a false statement within the jurisdiction of the Veterans' Administration, and that likewise, there was concealed and covered up from the Veterans' Administration the proposed non-occupancy of the houses by the veteran applicants.

Skinner, the associate of Fitzhenry, implicated Fitzhenry in Skinner's actions but had no knowledge and could not say "as a fact" that Petitioner had any agreement or understanding that Skinner and Fitzhenry (as the employer) would secure veterans to sign applications for guaranty insurance upon houses they did not intend to occupy (R. 484). However, he testified that "he came to believe" that Petitioner had such an understanding. He purported to recall that on two occasions he had purchased the veteran's title with monies delivered to him by Petitioner. The Petitioner affirms that when a property was recommended to him by Fitzhenry, that he "put up" the purchase money, but did not recall having ever delivered monies to Skinner directly. The Government's other evidence is that Petitioner was a full time salaried municipal employee, which was confirmed by Petitioner (R. 577). The jury acquitted the Petitioner upon all transactions except those transactions where the Petitioner appeared as the ultimate purchaser and in one which had ultimately been purchased and occupied by Skinner.

The majority of the Court below affirmed holding that the testimony of Skinner was sufficiently fortified by the "contradictory testimony" of Petitioner, to connect Petitioner with the activities of Fitzhenry and Skinner. When Petitioner testified, Skinner had just completed his testimony (in the presence of Petitioner) of course (R. 477). Peti-

tioner in reciting his recollection of a state of facts in existence several years prior to the trial stated: "I *have* never *known* or *met* or *heard of* Mr. Skinner" according to the transcript (R. 556). (Emphasis supplied.) Obviously, this mis-transcription of error or tense in the statement ("have" instead of "had", if not error, at most an inadvertence) is not worthy evidence sufficient to sustain a conviction as a claim by Petitioner that Petitioner had (at the trial) "never *known* or *met* or *heard of* Mr. Skinner", when Skinner had departed the witness stand a short time prior to this alleged "contradictory" statement relied upon as evidence by the Court below (R. 510).

Upon such evidence, the Court below sustained the conviction of Petitioner for having *caused* the false statements to be made in the *applications* and *affidavits* and for having *caused* the concealment of the fact that the veterans did not intend to occupy the property, holding also that Petitioner was not entitled to a specific jury instruction that to fix guilt Petitioner must have *known* that false statements were being made. It also held that the characterization of Petitioner as a "*profiteer*" and as "the octopus" and a further characterization as the "top dog" were *not improper* but were within permissible bounds. It also held that Petitioner need not have a criminal intent as a condition to guilt and that Petitioner as an accessory could properly be held guilty even though the false statements which he was charged with having caused to be made were not within his knowledge. Finally, the Court below held that the United States Attorney was within bounds when he criticized Petitioner for failing to produce as a witness one Mr. Jarrard, an attorney, upon whose advice the Petitioner had testified he relied in advancing the several sums of money to Fitzhenry even though Government counsel had placed Jarrard

under indictment, and Jarrard was present under subpoena in attendance upon the court and available immediately upon call by the Government. The ground for this decision was that the attorney would have been "expected" to corroborate the Petitioner.

No limit or bounds were set upon this type of argument either as to the characterizations of Petitioner or the presumption assessed against Petitioner by his failure to call a witness who was under indictment by the Government.

Reasons for Granting the Writ

I.

1. The decision of the court below in the instant case is directly in conflict with the decision of the Court of Appeals for the District of Columbia in *Freidus v. United States*, 223 Fed. 2d 598. Both cases concern alleged offenses under 18 U.S.C. 1001, and deal with the meaning of the terms "knowingly and wilfully" as used in such statute.

In the instant case, the Court of Appeals for the Fifth Circuit approved the trial court's charge[1] which removed from the jury's consideration the question of whether the Defendant acted with a criminal or evil intent.

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[1] "Now, getting back to the terminology. The word 'knowingly' and particularly as applied to the first thirty counts means this: with knowledge. And the question of wilfully means this: to wilfully act means voluntarily and purposely, or stated a bit differently, wilfulness is a development of the offense charged in the first thirty counts and it is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully and knowingly made or caused to be made false statements or affidavits or concealed or covered up by any trick, scheme or device a material fact. To prove this element, it is not necessary that the Government prove that the defendant had in fact evil intent. The word

The Court's own words in so approving such a charge are as follows:

> "The Appellant asks that 'wilfully' as used in the indictment be defined as meaning with bad purpose. The charge that for an act to be wilful, it must be done with evil intent or bad purpose is not here applicable * * *. The jury is here instructed that 'the word 'wilful' means no more than an intended act, that is a forbidden act, that is done deliberately and with knowledge.' This language had our approval in McBride vs. United States. * * *"

The *Freidus* case in construing this same provision reversed the trial court for failing to take the element of evil or criminal intent into consideration when applying Section 1001. That Court said:

> "Wilfully 'when used in a criminal statute, * * * generally means an act done with a bad purpose'. *U. S. vs. Murdock*, 1933, 290 US 389-394; 54 SCT 223-225; 78 Law. Ed. 381. In ruling on appellant's motion for acquittal, the trial judge erroneously said 'if the act was deliberate and voluntarily done and intentionally done * * *' the element of 'wilfulness' was

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'wilful' means no more than an interdicted act, that is, a forbidden act that is done deliberately and with knowledge.

"On the question of cause, I further charge you that it is immaterial that the defendants, or either of them, has disclaimed any consciousness of the fact that in causing a veteran to make a false affidavit, they were not conscious thereby that they were committing a crime. The fact that a single statement concerning a material fact was known to them, or either of them, and to be false, would be sufficient to complete this crime irrespective of any actual intention on his or their part, as the case may be, to violate the law." (R. 764)

> adequately supplied. The court concluded on this erroneous basis that there was sufficient evidence to go to the jury."

The Court of Appeals for the Fifth Circuit has discarded the traditional meaning of "wilfully and knowingly" by a cluster of recent decisions, including the instant case, *Corcoran v. United States*, 229 Fed. 2d 295, and *McBride v. United States*, 225 Fed. 2d 249.

This attitude of the Fifth Circuit has been adopted recently, despite the decision of its Chief Judge in *United States v. Moore*, 185 Fed. 2d 92, where in speaking of what is now Section 1001, said:

> "Under familiar canons of construction a penal act of the harshness and rigor of this one,—a harshness and rigor so great that, as the revisers point out in the notes to the Code, as amended in 1948, the punishment was deliberately reduced from ten to five years—*the statute will not be stretched beyond, it will be strictly confined within, the fair meaning of its terms.*" (Emphasis added.) Compare *Takahashi v. U. S.*, 143 Fed. 2d 118, 122 (CA 9) stating that *criminal intent* is an ingredient of Title 18 USCA, Sec. 80, the predecessor to the False Statements Statute.

Further, this attitude is taken despite its prior statement in *Russell v. United States*, 222 Fed. 2d 197, a case involving practically the same questions involved here that "There must exist a community of *unlawful intent* between the accessory and the perpetrator of the crime." (Emphasis added.)

The confusing character of the Fifth Circuit opinions is emphasized by the invalid rationalizations contained in its

writings.[2] The case of *Corcoran v. United States*, supra, was cited as authority by the Court in the instant case in support of its conclusion that the statutory language of "wilfully and knowingly" did not require proof by the government of a criminal or evil intent and submission of such element to the jury by proper instruction. Yet the *Corcoran* case involved one where the trial court (the same judge sitting as in the instant case) gave the following charge on the definition of "wilful":

> "For an act to be wilful within the purview of Section 1001, the person doing the act must have known what he was doing and deliberately did such act, *conscious that what he was doing would be unlawful.*" (Emphasis added.)[3]

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[2] See also **Hargrove v. United States**, 67 Fed. 2d 820, and **Wardlaw v. United States**, 203 Fed. 2d 881 Each of these cases involved an alleged tax violation denounced in statutory language employing the term "wilfully". The Fifth Circuit held that the addition of the word "wilfully" required that a criminal or evil intent was a necessary ingredient of the offense. Certainly, no good reason exists for a distinction in the necessary intent where both statutes employ the identical language. If a difference does validly exist in the law, this is all the more reason for clarification by the Supreme Court.

[3] The Corcoran case was tried in the District Court several months after the instant case, yet was acted on by the Court of Appeals for the Fifth Circuit prior to the instant case. Evidently, even the trial court, by adding the phrase **"conscious that what he was doing was unlawful"** recognized that his former charge in cases under his section was erroneous.

Attention is called to the fact that Attorney Jarrard, whose absence as a witness in the instant case was commented upon at great length by the Government in oral argument was one of the Defendants in the Corcoran case. (See 229 F. 2d 295, 297 of the alleged participation of Jarrard.)

Thus, it is seen that an actual charge allowing the jury to consider the criminal intent of the Defendant was given.

2. Clearly the question here presented is of *importance* because it involves the very heart of the crime defined by Congress in Section 1001, as well as the administration of the criminal law generally. Congress is presumed to know the meanings of words and phrases used in statutes. The common law has always employed both or either of the terms "knowingly" and "wilfully" to denote criminal intent. *Morrissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 Law Ed. 288. Therefore, Congress placed the terms "knowingly" and "wilfully" in Article 1001 for the express purpose of making criminal or evil intent a necessary part of the crime there defined.

If the construction given this statute by the Fifth Circuit stands, Congress was doing a futile, idle and unnecessary act by placing these words of art in the statute. In their absence, the same result would have been reached by the Fifth Circuit. It is not believed that Congress employed such words simply as surplusage.

Moreover, the Supreme Court has never acted directly on the question of whether evil or criminal intent is a necessary ingredient of the offense defined in Article 1001. It has done so in considering other criminal statutes where the question has been presented.

The question presented here concerning the evil or criminal intent assumes a greater importance than do constructions of ordinary criminal statutes because the Government is now utilizing Section 1001 as a "catchall" measure for

indirect punishment of other crimes involving difficult proof.[4]

The increase in the use of this statute by prosecutors as a weapon against alleged law violators is seen by many recent lower court case decisions involving its construction.

3. It is submitted that the decision of the court below is erroneous and that the conflicting decision of the Court of Appeals for the District of Columbia in *Freidus v. United States*, supra, is correct. Further, it is believed that the decision below conflicts with the applicable decisions of this Court.

In construing criminal statutes other than Section 1001, all of which contain the terms "knowingly" and "wilfully" as descriptive of the punishable conduct, this court has held uniformly that such statutes require proof of and a finding by the jury that the prohibited act was "done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, perversely." This court has further held that "the word (wilfully) is also employed to characterize a thing done without ground for believing it lawful * * * or conduct marked by careless disregard whether or not one has the right to act." *U. S. v. Murdock*, supra.

Even in statutes defining an offense that was known to the common law and such statutes omitted the terms "knowingly", "wilfully", "intentionally", "fraudulently" or "maliciously" criminal or evil intent, nevertheless, was held to

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[4] "The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecutors' path to conviction, to strip the Defendant of such benefit as he derived at common law from innocence of evil purpose and to circumscribe freedom heretofore allowed juries." **Morrissette v. United States**, supra, page 263, U. S. Reporter.

be a necessary element of the crime. *Morrisette v. United States*, supra.

The *Morrisette* case holds that only crimes of a petty nature tantamount to a misdemeanor are subject to proof without evil intent. Implicit in this decision is the holding that any statute defining punishable conduct in terms of its knowing and wilful commission require consideration by the jury or other trier of fact of whether criminal or evil intent was present. Certainly the offense made by Section 1001 is not of a petty character as referred to in the *Morrissette* case, because the crime there defined is a felony with harsh and rigorous punishment. It is submitted that the *Morrissette* case certainly demonstrates this Court's reappraisal of the whole question of criminal intent as applied to the Federal system to the end that "the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act." *Morrissette v. United States*, supra (Page 274, U. S. Reporter).

It is submited in the light of this Court's prior decisions on problems similar to the one presented by the instant case that Congress did not intend to punish the accidental, undeliberate, innocent making or causing the making of false statements. Any defendant charged under such act is entitled to have the jury weigh all the circumstances produced in evidence showing the justifiable nature of the false statement, and the defendant's lack of bad purpose or design in so making it. Petitioner has been denied this basic protection.

II.

The decision below approving the characterization of Petitioner as "profiteer", "octopus", and "top dog" is directly

contrary to *Berger v. U. S.*, 295 U.S. 78 and its *approval* of this language constitutes the countenancing of such a departure from the accepted and usual course of Federal criminal proceedings as to call for the exercise of this Court's power and duty to establish and maintain proper standards of procedure and evidence in the Federal Courts. *McNabb v. U. S.*, 318 U.S. 332, 324, 341.

Of like importance is the *approval* by the Court below of the jury argument criticising Petitioner for not calling his former attorney to testify while also suggesting that this same attorney should perhaps have been named in the indictment with Petitioner and Fitzhenry, although it was known to the prosecution that the attorney was then under indictment with others for the same alleged character of offenses and was in attendance upon the court and as available for call by the prosecution as by the Petitioner. (The opinion does not mention the fact of the indictment pending against Jarrard the attorney and suggests that he could be "expected" to corroborate Petitioner, hence a presumption arose upon failure of Petitioner to call him that he would not do so.

The opinion finds no error in these comments (including the comment that perhaps the attorney should have been a defendant in the instant indictment) and does not purport to apply the harmless error doctrine but *flatly approves* these characterizations and inferences. The opinion below neither sets nor suggests any permissible bounds to such argument.

Uncorrected and unlimited as to bounds, the decision is a threat to orderly procedure and personal liberty in the Federal Courts. It is safe to assume that approval of the conviction will encourage similar practices throughout the

Country where prosecutors attempt to *probe even further* the unknown boundaries of error with consequent enhancement of the possibilities of *conviction of the innocent.* Of practical importance is the effort of the Government to prove that Petitioner caused the criminal acts committed by another and was therefore guilty as an accessory, while conceding that Petitioner had no connection with the perpetrations of the acts themselves. To do so it relied upon the testimony of Skinner who admitted performing the acts but who has testified that he knew of no guilty knowledge of the Petitioner. In an agreement with Fitzhenry (R. 484), who also, by *way of a contradictory position*, implied that Petitioner discussed the securing of veteran applicants. The opinion below apparently recognizes the weakness and inadequacy of this testimony but finds support for the conviction in an alleged contradiction by Petitioner which, when examined in its context leaves a definite and firm conviction that there was no contradiction and that a mistake was committed by the Court in so assuming. *U. S. v. U. S. Gypsum Company*, 333 U.S. 364.

As shown by the transcript of record, Petitioner was being interrogated as to past events and his answer, "I have never known, or met or heard of Mr. Skinner" Rec., given soon after Mr. Skinner had left the witness stand, could hardly be interpreted to mean that Petitioner (at the trial) was claiming, he had *never known* or *met* or *heard of* Mr. Skinner. This bolstering of inadequate proof emphasizes the fact that the proof in this case is of the weakest and most speculative sort. *Under such circumstances, the personal abuse to which Petitioner was subjected for the benefit of the jury was substantive error. Berger v. U. S.*, 295 U.S. 78, 84, and the failure of proof results that prejudice to the accused was so highly probable as a result of the prose-

cutor's improper comment "that we are not justified in assuming its non-existence".

The decisions of this Court have uniformly held that guilt is for the jury under proper procedural safeguards (a part of substantive liberty) and is not committed to an Appellate Court. *Bollenbach v. U. S.*, 326 U.S. 606, 615. *Kotteakos v. U. S.*, 328 U.S. 750, 763-4; *Krulewitch v. U. S.*, 336 U.S. 440, 445.

The judicially approved violation by the United States Attorney as the representative of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore in a criminal prosecution is not that it shall win a case but that justice shall be done" would seem to so adversely affect the administration of criminal justice in the future as a whole as to call for a review thereof.

Conclusion

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Title 18 USCA Sec. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

(b) Whoever willfully *causes* an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

Title 18 USCA Sec. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each of such shall be fined . . .

Title 18 USCA Sec. 1001

Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully, falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . .

APPENDIX B

(Opinion of the Court Below)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15515

R. I. McCLANAHAN, *Appellant*,

VERSUS

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(March 16, 1956)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant, R. I. McClanahan, was an electrical inspector employed by the City of Houston, Texas. He made the acquaintance of C. L. Fitzhenry, a real estate broker and building contractor.

Appellant provided funds for the purchase of dwellings from veterans who had rights to home loan guaranties by the Veterans Administration. These veterans, all of whom were without any intention of occupying the property acquired and simultaneously sold by them, were located by Benjamin Skinner. Skinner was brought into the picture by Fitzhenry. Skinner received $50 for each veteran he procured. The veteran, brought to Fitzhenry, would fill out the forms for procuring an insured V. A. Loan and a contract for the purchase of a specific property. The receipt of a down payment was acknowledged, but was not made by the veteran. The property, the subject matter of the transaction, was never seen by the veteran. In completing the loan application form, each of the veterans was required to state as the purpose of the loan that he was acquiring a home. Each veteran and his wife were required to make an affidavit that they would occupy the property as their homestead. None of the six veterans in the transactions involved in this appeal saw the property and none of them had any real intention of occupying it. Upon the transfer of title to the veteran and the closing of the loan he would convey the property to the appellant, receive between four and five hundred dollars, and go his way. When the title to a dwelling was in appellant's name he provided the funds with which to pay the veteran. Fitzhenry then found purchasers for the equity above the V. A. guaranteed loan at prices at or in excess of a thousand dollars. Appellant was reimbursed for his outlay in the venture, and the remainder was divided between Fitzhenry and appellant.

Fitzhenry and appellant were charged in a thirty-one count indictment. Also named in the indictment as a defendant was Charles H. Baldridge, as to whom the in-

dictment was dismissed on motion of the United States Attorney. The first thirty counts related to ten separate transactions, each of which formed the basis of three counts of the indictment. Of these groups the first count charged that the defendants "did knowingly and wilfully cause to be made a false, fictitious and fraudulent statement and representation" in inducing a named veteran to make the false statement in the loan application. 18 U.S.C.A. § 1001, § 2. The second of each group of three counts charged that McClanahan and Fitzhenry "did knowingly and wilfully, by a scheme, trick and device, conceal and cover up and caused to be concealed and covered up a material fact" that the named veteran did not intend to occupy the premises as described as his home. 18 U.S.C.A. § 1001. The third of the series of counts charged that Fitzhenry and McClanahan "did knowingly and wilfully cause to be made a false, fictitious and fraudulent statement and representation" in causing the veteran and his wife to make the affidavit of intent to occupy the property as a homestead. 18 U.S.C.A. § 1001, § 2. Each of the counts recites that had the Veterans Administration known that the veteran did not intend to occupy the premises as a home the V. A. Loan Guaranty would not have been issued. The thirty-first count charged the appellant, Fitzhenry, and Baldridge with conspiracy to do what the prior counts charged had been done and set forth thirty-three alleged overt acts. 18 U.S.C.A. § 371. Fitzhenry was convicted on all counts. The appellant R. I. McClanahan, was found guilty on the substantive counts involving six transactions, eighteen counts, and on the conspiracy count. He was given a suspended sentence of twenty-seven months and a fine of $1,500.00. A motion of the appellant for a new trial and in arrest of judgment was denied. Before us the appellant urges that the only evidence that tied him to any illegal transactions

was the "unsupported, contradictory, vague, equivocal and sometimes incredible" testimony of Skinner, an acknowledged accomplice of Fitzhenry; that the charges to the jury were erroneous, particularly with respect to criminal intent; that Government counsel made prejudicial insinuations of undisclosed knowledge of facts adverse to appellant; and that the jury argument of Government counsel was improper.

The court properly charged that Skinner and the veterans would be, in effect, if not principals, accomplices whose testimony should be received with caution and scrutinized with care. It was Skinner's testimony that his initial contact with Fitzhenry was in the fall or early spring of 1950 or 1951 when he inquired if he could buy another home with a V. A. loan guaranty, he having already exercised his privilege of purchasing a dwelling with a V. A. guaranty. He quoted Fitzhenry as saying it would be all right if he were to get a veteran to buy the house for him and buy the house from the veteran. Skinner found a veteran, Joel W. Jackson, and a house was purchased which had been built by McClanahan under the supervision of Fitzhenry but with title in the developer, Oak Meadows Corporation. Fitzhenry then proposed to Skinner, so Skinner testified, that each of them would put up part of the necessary funds and they would get veterans to use their V. A. loan guaranty rights in acquiring residential properties and split the profits, but instead he went to work for Fitzhenry securing veterans for a flat rate of fifty dollars. Skinner told of an occasion when he, Fitzhenry and the appellant were together discussing the availability of veterans, where they were most available and where they, the three of them, could get them the easiest. Skinner quoted appellant as telling him that he, Skinner, had better luck at

Sinclair Rubber (among whose employees most of the veterans secured by Skinner were found), than appellant had with those contacted by him because, appellant is quoted as saying, the men that worked uptown were wiser than the guys that worked at Sinclair. Skinner testified regarding a transaction where the veteran was K. P. Bradshaw who wanted cash. McClanahan provided Skinner, so Skinner said, with a cashier's check for $400.00 payable to Skinner which he cashed. On two occasions, Skinner related, the appellant gave him a personal check or cash with which to pay the veteran. The testimony was plausible and there is no reason for rejecting or disregarding it.

A conviction may rest upon the uncorroborated testimony of an accomplice. Todorow v. United States, 9th Cir. 1949, 173 F. 2d 439. The conviction here is not wholly dependent upon Skinner's testimony. The appellant took the stand. His testimony was in some respect equivocal and in others contradictory. In telling of the deal with Jackson the appellant stated that he didn't know Jackson but he then (at the trial) understood that Skinner was the eventual first owner of the house. He went on to say, "I have never known or met or heard of Mr. Skinner". He later testified:

> "Well, I had seen Mr. Skinner around this addition and see him talking to Fitzhenry, and everywhere I saw Skinner every time I saw him talking to anybody he always had some kind of a deal, he was always promoting something, trying to sell a house or do this or do that. I mean, he mentioned several times he had these various houses or so forth lined up, I mean, at first I wasn't interseted in it because Mr. Fitzhenry and I had planned to go ahead with this building.

> 'But at some time in there, well, he did come up with one and he talked to Fitzhenry about it or talked to me about it and if he talked to me I sent it back to Fitzhenry or told him to talk to Fitzhenry because I wasn't interested. Actually at that time I didn't want to fool with houses. I didn't know anything about the value of houses and property and so forth."

On cross-examination he was asked if Government counsel had misunderstood him to say that he had never known, met or heard of Mr. Skinner until the indictment. He responded "You did misunderstand me. I said I never knew or heard of Mr. Skinner until he came to us with these houses and so forth." It was established that each of the veterans involved in the substantive counts conveyed to the appellant. Without further extending our review of the facts, we deem it enough to say that the evidence shows that the appellant, with Fitzhenry, and through Fitzhenry and Skirner, knowingly and wilfully caused the false statements and representations to be made in the applications and affidavits involved in the six transactions from which stem the convictions on the substantive counts, and knowingly and wilfully, by trick, scheme and device caused to be concealed and covered up the material fact that the veterans did not intend to occupy the property ostensibly purchased by them.

The appellant takes up, one by one, the overt acts listed in the conspiracy count of the indictment, and argues that no one of them is sufficient to support a conviction of the conspiracy charge. The evidence cannot be divided into small segments and each particle weighed separately. All must go into the scales together. The appellant stresses the fact that Skinner was unable to testify that there was an

arrangement between Fitzhenry and the appellant. "The existence of the agreement or joint assent of the minds need not be proved directly, but may be inferred by the jury from other facts proved." 11 Am. Jur. 570, Conspiracy, §38. The contention that the evidence is not sufficient to sustain the conspiracy conviction is not well founded.

While on the stand the appellant testified with respect to the advice that he had received from his attorney, Joe Jarrard, whom he met before he commenced buying properties from veterans. He testified:

> "I went to Mr. Jarrard's office to seek legal advice because he was a lawyer, and I knew as everyone else knew it was common practice for the veterans to sell houses which they then owned. I asked Mr. Jarrard if there was any legal technicality or anything that might come up later with respect to or with reference to buying property which had originally been bought by a GI and which was insured by what we referred to as a GI loan, and he told me that there was not."

Appellant said he relied upon this advice. He explained:

> "Before any transactions were made, before he drew any papers for me at all, I mean I asked him this question: if there was any technicality in this and he assured me there was not, so it was on his legal advice that I bought this property."

He denied any understanding that veterans were to be induced to make false statements to get title to houses, saying:

> "There was no such understanding, and it was not done. We didn't induce anybody to buy houses. Any house that I bought, as far as I know the veteran had title to it. Why he got title to it, I don't know and, frankly, after I asked Jarrard if it was legal for me to buy the property I wasn't concerned with why the veteran had title to it. In other words, it was my understanding then, and it is still my understanding, if a person has legal title to property then it is theirs to do what they want to with it."

He further said:

> "Before any deed was drawn into me I specifically asked if there was any technicalities involved in this and I got his specific answer of no."

The appellant requested an instruction on the consideration to be given to the matter of reliance upon legal advice. The substance of the requested instruction was that if such advice was followed, even though it was erroneous, the acts would not be wilful if done in reliance on the advice received. The appellant asked that "wilful" as used in the indictment be defined as meaning with bad purpose. A charge that for an act to be wilful it must be done with evil intent or bad purpose is not here applicable. *Corcoran v. United States,* 5th Cir. 1956, F. 2d . The jury were instructed that "The word 'wilful' means no more than an interdicted act, that is, a forbidden act that is done deliberately and with knowledge." This language had our approval in *McBride v. United States,* 5th Cir. 1955, 225 F. 2d 249, cert. den. U.S. , S. Ct. , 100 L. Ed. Adv. Rep. 183. The advice of counsel would not

justify the appellant in the wrongdoing condemned by the statutes under which he was indicted and convicted. The appellant relies upon *Hargrove v. United States*, 5th Cir. 1933, 67 F. 2d 820. This case was distinguished in the opinion in *McBride v. United States, supra*, and for like reasons is to be distinguished here.

The appellant requested an instruction which would have told the jury, in effect, that without proof beyond a reasonable doubt that appellant knew false statements were being made by the veterans there could be no conviction. As in *Russell v. United States*, 5th Cir. 1955, 222 F. 2d 197, and as in *Corcoran v. United States, supra*, there is evidence that the appellant "was in on the commission of the offense from its inception and after its conclusion". The court incorporated in its jury instructions the statutory provision as to aiding and abetting. That which was said by this court in *Russell v. United States, supra*, is applicable here. From that opinion we quote:

> "Under the federal statute, 18 U.S.C.A. 2, an accessory before the fact becomes a principal; an aider and abettor may be indicted, tried and convicted as a principal. [Citing cases]. There must exist a community of unlawful intent between the accessory and the perpetrator of the crime, but '* * an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him', [Citing authorities]. It is not essential that the accessory know the modus operandi of the principal. Keliher v. United States, 1 Cir. 193 F. 8, 17. In each of the cases of Todorow v. United

States, 9 Cir., 173 F. 2d 439, 443, and Turner v. United States, 9 Cir., 202 F. 2d 523, the evidence was held sufficient to show that the defendant caused the false statements there involved to be made to the Veterans Administration." *Russell v. United States*, 222 F. 2d 197, 198-199.

The refusal to give the requested instruction was proper.

During the trial the appellant was being cross-examined about the part he played in one of the transactions. In responding to an objection for relevancy, the Government attorney commented:

> "If your Honor please, the reason that he didn't take a more active part openly in this transaction was that he was too busy as electrical inspector, and I think the evidence has now shown that probably the reason—there were probably other reasons for it."

Appellant now claims this statement was a suggestion that appellant was concealing something. We do not so regard it. Apparently appellant's counsel did not then think the remark improper as no objection was interposed, and the appellant himself, as in answering a question, said, "There was no other reason". The appellant was not prejudiced. A short time later the prosecutor was making inquiry of the appellant regarding one of the transactions. The following ensued:

> "Q. It says that the man was paid fifty dollars, and you heard Mr. Bradshaw come up here and testify that that came out of the veteran's file; was that true?

A. I don't know anything about this. This is the first time I seen it. My signature does not appear on it, I know nothing about this contract.

Q. Your signature appears on none of these instruments, is that your testimony?

A. I didn't say that. I said it doesn't appear on that instrument.

Q. His Honor was asking you a few moments ago about your familiarity with the affidavits that are signed in connection with the closing of these matters. When a man has to swear a lie in order to accomplish, as you say, the exercise of his rights, do you think that is a scheme, trick, or device?

A. If any man swore a lie I know nothing about it. I didn't swear a lie to anything.

Q. I think the record is quite clear, Mr. McClanahan, that you stayed completely away from the paper work as much as possible. That is not my point.

MR. CASH: That is arguing with the witness and prejudicial. I ask that he be instructed not to make further statements like that.

THE COURT: That is right."

No useful purpose was served by the United States Attorney arguing with the appellant but we do not see that it did harm. The court stopped the colloquy as soon as objection was interposed and the examination continued.

In argument to the jury, Government counsel made reference to the failure of the appellant to call Joe Jarrard as a witness, he being the attorney who had advised the appellant. The failure of a party to produce as a witness one peculiarly within the power of such party creates an inference that such testimony would be unfavorable, and

may be the subject of comment to the jury by the other party. *Ford v. United States*, 5th Cir. 1954, 210 F. 2d 313. It is said that no inference arises, and hence no comment is permissible, "where the person in question is equally available to both parties; particularly where he is actually in court; though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly". Wigmore, Evidence, Vol. II, pp. 169-171, §288. Here the person not called was or had been the appellant's attorney and it might be expected that his testimony, if given, would corroborate that of the appellant as to the legal advice given. In such situation it cannot be said that the attorney was as available to the prosecution as to the defense. The rule is thus stated:

> "* * * the question of equal availability of a witness not called is largely a question of fact, and various courts have regarded all manner of circumstances as bearing upon the matter." Jones, Commentaries on Evidence, Vol. I, pp. 169-170, §98.

It has been well said that "the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the case." *Deaver v. St. Louis Public Service Co.*, Mo. App., 199 S.W. 2d 83.

Ordinarily no inferences are permitted as a result of the failure to call to the witness stand one whose testimony would be privileged. However, when the appellant testi-

fied as to the legal advice given him he waived the privilege he could otherwise have asserted to the testimony of his attorney; and such waiver would also raise the inference that the testimony would be unfavorable and allow the comment to the jury of the failure to call him as a witness. See Wigmore, Evidence, Vol. II, p. 167, §286.

The appellant also urges that the conviction and sentence cannot stand because in his jury argument counsel for the United States referred to the appellant as a "profiteer" and as "top dog", and because of references to Skinner and the participating veterans as the "tentacles of the octopus", inferring, so appellant says, that he was the "octopus". These words, in the context in which they were used, did not go beyond proper comment and no harm resulted.

The failure to mention other matters urged by appellant does not mean that they have gone unnoticed. We have considered all questions raised and finding in none any error requiring reversal, the judgment appealed from is

AFFIRMED.

CAMERON, Circuit Judge, concurs in the result.

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX C

JUDGMENT

Extract from the Minutes of March 16th, 1956.

R. I. McCLANAHAN,

No. 15515. versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

"Cameron, Circuit Judge, concurs in the result."

* * * *

Proof of Service

I, David Bland, one of the attorneys for Petitioner, R. I. McClanahan, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of May, 1956, I served copies of the foregoing Petition for Certiorari on the United States by mailing a copy thereof in a duly addressed envelope to Hon. Malcolm R. Wilkey, United States District Attorney for the Southern District of Texas, Second Floor, Post Office Building, Houston, Texas, and by mailing a copy to The Solicitor General, Department of Justice, Washington, D. C., with air mail postage prepaid.

DAVID BLAND
Attorney for Petitioner
405 Esperson Bldg.
Houston, Texas

Office - Supreme Court
FILED
JUN 12 19
CHARLES H. WILEY

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	15

CITATIONS

Cases:

Browder v. *United States*, 312 U. S. 335	10
Chadwick v. *United States*, 117 F. 2d 902, certiorari denied, 313 U. S. 585	14
Claasen v. *United States*, 142 U. S. 140	10
Dunlop v. *United States*, 165 U. S. 486	13
Fields v. *United States*, 164 F. 2d 97, certiorari denied, 332 U. S. 851	10
Fotie v. *United States*, 137 F. 2d 831	11
Freidus v. *United States*, 223 F. 2d 598	11
Graves v. *United States*, 150 U. S. 118	14
Hirabayashi v. *United States*, 320 U. S. 81	10
McBride v. *United States*, 225 F. 2d 249, certiorari denied, 350 U. S. 934	10
Mitchell v. *United States*, 143 F. 2d 953	10
Morissette v. *United States*, 342 U. S. 246	11
Pinkerton v. *United States*, 328 U. S. 640	9
Screws v. *United States*, 325 U. S. 91	10
Spies v. *United States*, 317 U. S. 492	10
United States v. *Antonelli Fireworks Co.*, 155 F. 2d 631, certiorari denied, 329 U. S. 742	14
United States v. *Carter*, 217 U. S. 286	14
United States v. *Murdock*, 290 U. S. 389	10
United States v. *Norris*, 300 U. S. 564	10
United States v. *Otto*, 54 F. 2d 277	11

Cases—Continued

	Page
United States v. *Searey*, 180 F. 2d 837, certiorari denied, 339 U. S. 979	10
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 237	13
Walker v. *United States*, 192 F. 2d 47	10
Statutes:	
18 U. S. C. 371	2–3
18 U. S. C. 1001	2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 948

I. I. McCLANAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 20–32; R. 839–852) is reported at 230 F. 2d 919.

JURISDICTION

The judgment of the Court of Appeals was rendered on March 16, 1956 (Pet. App. 33; R. 853). A petition for rehearing (R. 854–869) was denied on April 16, 1956 (R. 870). The petition for a writ of certiorari was filed on May 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court erred in charging the jury that the phrase "knowingly and wilfully", as used in 18 U. S. C. 1001, means an act done "deliberately and with knowledge" rather than with an "evil or bad purpose."

2. Whether the United States Attorney's closing remarks constituted prejudicial misconduct.

STATUTES INVOLVED

18 U. S. C. 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more

than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Texas on 19 counts of an indictment which charged him, together with one Fitzhenry, with conspiracy to cause veterans to make false statements to the Veterans Administration in connection with home loan guaranties, and with substantive violations of 18 U. S. C. 1001 (R. 5–44, 783–784).[1] He was sentenced generally to a term of imprisonment for twenty-seven months and to a fine of $1,500. The execution of the sentence was suspended for five years and petitioner was placed on probation (R. 796–798). On appeal, the conviction was affirmed (R. 853).

The evidence adduced at the trial may be summarized as follows:

Early in 1952, petitioner arranged with codefendant Fitzhenry to buy new homes from veterans who exercised their G. I. loan guaranty rights on them, and to resell them to persons who were not entitled to G. I. loans. Petitioner was the financier of the venture while Fitzhenry located the eligible veterans (R. 579, 586, 608–612).

---

[1] Petitioner was found guilty on the conspiracy count and on 18 substantive counts, out of 31 counts on which he was indicted (R. 783–784).

For a flat rate of fifty dollars apiece, Fitzhenry in turn employed one Skinner to find eligible veterans to purchase new homes which Fitzhenry had located (R. 483-485). Petitioner bought houses from at least six veterans and resold them to persons who otherwise would have been unable to secure a G. I. loan (R. 586, 587–589).

In all six cases, the negotiations were handled in substantially the same manner. The transaction with veteran Pribble, which is described in the substantive counts and also in the overt acts in the conspiracy count, is typical (R. 14–17, 44).[2]

Pribble heard through the "grapevine" about the selling of G. I. home loans rights and contacted Fitzhenry (R. 257, 274). He discussed the legality of the transaction with Fitzhenry, and Fitzhenry advised that he bought many such rights and "hadn't got in trouble yet." Without even seeing the house or having his wife see it (R. 259, 277), Pribble signed, in Fitzhenry's office, an application for a G. I. loan on the house in which he stated that his purpose was to buy a home (R. 90, 92–93, 100, 257–258, 259). Pribble, however, did not intend to live in the house or to purchase it as a home (R. 258). Nor did he pay any earnest money on the transaction as recited in the contract of sale (R. 263–

[2] The transactions with the other five veterans appear in the record as follows: Jackson, R. 165–178; Trinkle, R. 204–218; Baldridge, R. 337–343; Rock, R. 392–401; Bradshaw, R. 447-456.

264). The sole purpose of the transaction on Pribble's part was to get the loan on the house and to resell the rights thus obtained (R. 258–259).

The application was then processed through the Veterans Administration (R. 90–92). When it was approved and the loan was granted (R. 268, 270), the property was conveyed to the veteran and his wife (R. 260–261). They thereupon signed an affidavit stating that they were in possession of the premises, that the utilities were connected, and that they would occupy the premises as their homestead (R. 97–98, 262–263). These statements were false (R. 263). The veteran and his wife immediately conveyed the property to petitioner and his wife (R. 97–98, 261), receiving $500 from Fitzhenry for the transaction (R. 271). Petitioner, through Fitzhenry, resold the house with the G. I. loan on it to a purchaser who was not able to secure G. I. financing (R. 284–285).

Skinner testified that in discussions with Fitzhenry and petitioner concerning G. I. loans, petitioner told him (Skinner) that he had better luck at Sinclair Rubber (where Skinner worked) "than he [petitioner] did with the men he contacted because the men that worked uptown were wiser than the guys that worked at Sinclair" (R. 488–489). Skinner also said that petitioner gave him money on two occasions to pay a veteran for selling his rights (R. 489), and that

the deeds from the veteran were made to petitioner because petitioner financed the transaction (R. 490, 491).

Skinner also testified that, after the F. B. I. questioned him, he saw petitioner, who asked him what was wrong; that he replied that he could not tell him, but that it was bad; and that later that evening, when he went to Fitzhenry's home, he saw petitioner and Fitzhenry working on a table with a cash register and with pencil and eraser (R. 508–510).

Petitioner and Fitzhenry were questioned by the F. B. I. after being fully advised as to their rights. Fitzhenry admitted that he was buying G. I. guaranties from veterans. Petitioner stated that he made investments through Fitzhenry and that everything was a matter of record and "that if it was wrong it was wrong" (R. 511–512).

Petitioner testified that early in 1952, before the occurrence of any of the transactions here involved, he "knew as everyone else knew it was common practice for the veterans to sell houses which they then owned", and he consulted his attorney, Mr. Jarrad, about the legality of such a practice; that Mr. Jarrad advised him that such transactions were legitimate; and that, relying upon such advice, he went ahead and arranged with Fitzhenry to buy houses from veterans and to split the profits (R. 579, 585–586, 590, 614, 679). Petitioner stated that he had never met any of the veterans from whom he purchased

homes and that he had not even seen the houses, but that this was not strange since he was buying and reselling houses just as some people buy and sell cars (R. 595). He testified that, although he knew that the houses that Fitzhenry was buying were covered by G. I. mortgages, he did not know how or when the individual veteran obtained the mortgage; that he did not know that Fitzhenry and the veteran had a prearranged plan to obtain the G. I. loan on it and immediately convey the house to him; and that if Fitzhenry had such a plan it was without his authority (R. 611, 635). He explained that, although the veteran held the house for only a few days at most and had not made any payments thereon, the $400 or $500 paid to the veteran was for the veteran's equity (R. 618–622). He denied having any dealings with Skinner personally (R. 630). When shown one of his documents from which the notation, "$50 Skinner, for a commission, get money back", was erased, petitioner said that he could not read the erasure (R. 681–682, 689).

ARGUMENT

1. In its final charge to the jury, the court, contrary to petitioner's request (R. 778–779), defined "knowingly and wilfully" as used in 18 U. S. C. 1001, as follows (R. 764–765):

> * * * The word "knowingly" and particularly as applied to the first thirty

> counts means this: with knowledge. And the question of wilfully means this: to wilfully act means voluntarily and purposely, or stated a bit differently, wilfulness is a development of the offense charged in the first thirty counts and it is necessary for the Government to prove beyond a reasonable doubt that the defendant wilfully and knowingly made or caused to be made false statements or affidavits or concealed or covered up by any trick, scheme or device a material fact. To prove this element, it is not necessary that the Government prove that the defendant had in fact an evil intent. The word "wilful" means no more than an interdicted act, that is, a forbidden act that is done deliberately and with knowledge.

Later, the court defined the word "fraudulent", as used in 12 of the substantive counts under which petitioner was convicted, as follows (R. 766, 770):

> Gentlemen of the jury, in one or two instances there was a question of the use of the word "fraudulent". A fraudulent statement is simply a misrepresentation. In substance it can be defined as intentionally deceitful. It also has been defined in one word as dishonest.
>
> * * * * *
>
> * * * knowingly and wilfully cause to be made a false—false, of course, means untrue—fictitious—means not a fact—fraudulent—I have explained to you as intention-

> ally deceitful—statement and representation concerning the material facts * * *.

Defining criminal intent under the conspiracy charge, the court charged (R. 774):

> Now, gentlemen, considering now the thirty-first count. If you believe beyond a reasonable doubt that in the Houston Division of the Southern District of Texas within the jurisdiction of this Court C. L. Fitzhenry and R. I. McClanahan, hereinafter called defendants, did unlawfully—that is, contrary to the law—knowingly—that is, with knowledge—and feloniously—that is with evil intent—combine, conspire and confederate and agree one with the other and with other persons to the grand jurors unknown, to commit certain offenses against the United States—* * *.

Petitioner contends (Pet. 8–14) that the failure of the court to instruct that the phrase "knowingly and wilfully" as used in 18 U. S. C. 1001 meant "evil intent" constituted prejudicial error. But he overlooks the fact that in 12 out of the 18 substantive counts under which petitioner was convicted, the court, as shown above, required the jury to find in effect an "evil intent" or "corrupt intent" (*supra*, pp. 8–9), and that under the conspiracy count the court specifically required "an evil intent". Petitioner's conviction under any one of these counts supports his general sentence. See *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States*, 320

U. S. 81, 85; *Claasen* v. *United States,* 142 U. S. 140, 146–147.

Moreover, there was no error in the charge that a finding of "evil intent" was not required. This Court in *United States* v. *Murdock,* 290 U. S. 389, 394–395, upon which petitioner relies (Pet. 9, 13), held that "wilfully" is a word of many meanings. *Screws* v. *United States,* 325 U. S. 91, 101; *Spies* v. *United States,* 317 U. S. 492, 497; see, also, *Fields* v. *United States,* 164 F. 2d 97 (C. A. D. C.), certiorari denied, 332 U. S. 851–852. It can mean, at one extreme, performing an act with an evil purpose, or, at the other extreme, it can characterize conduct which is merely knowing or voluntary as distinguished from accidental. Its construction in each case must be determined from its context. *Screws* v. *United States, supra.* As applied to 18 U. S. C. 1001, the instruction given by the trial court finds ample support in cases decided thereunder (*McBride* v. *United States,* 225 F. 2d 249 (C. A. 5), certiorari denied, 350 U. S. 934; *Walker* v. *United States,* 192 F. 2d 47 (C. A. 10); see also *Mitchell* v. *United States,* 143 F. 2d 953, 956 (C. A. 10)), and under similar statutes. *Browder* v. *United States,* 312 U. S. 335; *United States* v. *Norris,* 300 U. S. 564, 574; *United States* v. *Seavey,* 180 F. 2d 837 (C. A. 3), certiorari denied, 339 U. S. 979; *Fotie* v.

United States, 137 F. 2d 831, 840 (C. A. 8); *United States* v. *Otto*, 54 F. 2d 277, 279 (C. A. 2).[3]

Freidus v. *United States*, 223 F. 2d 598 (C. A. D. C.), with which petitioner claims a conflict, did not turn on the question here in issue. In that case, the court of appeals found it unnecessary to rest its decision on the adequacy of the instruction as to willfullness "[s]ince we set aside the conviction on other grounds" (p. 603, fn).

Morissette v. *United States*, 342 U. S. 246, does not, as petitioner seems to believe (Pet. 13–14), hold that evil motive will ordinarily be deemed a necessary element of a serious crime, but merely that the element of intent will usually be read into such a crime. Indeed, that opinion, dealing with the crime of conversion, states that a defendant "must have had knowledge of the facts, *though not necessarily the law*, that made the taking a conversion" (p. 271; emphasis supplied). Here, the judge did charge that the causing of the false statements had to be done "deliberately and with knowledge." And petitioner's argument that specific intent to violate the law should also have been required finds no support in the *Morissette* decision.[4]

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[3] The *Browder* case involved a false statement on a passport application; the other cases cited arose under the federal perjury statute.

[4] Allied to the objection to the charge is the contention, raised as a question but not argued (Pet. 4), that the jury should have been instructed to consider the effect of legal advice on the issue of intent. Aside from the fact that such

2. In his closing, the United States Attorney argued as follows (R. 740–741, 744, 747):

> * * * gentlemen, if we are going to get at a scheme like this, if we are going to stop it, we are going to have to get at the people at the top, the people that are really the profiteers in the thing.
>
> Skinner was out there making fifty dollars to seventy-five dollars a deal on it, according to the number of veterans.
>
> Mr. CASH. I object to calling the defendants profiteers. That is prejudicial and I think the jury should be instructed not to consider it.
>
> The COURT. Overruled.
>
> Mr. SNODGRASS. We just want to get at the people who are making the profit in this thing. I would like to get all the tentacles of the octopus, if you want to draw an analogy, gentlemen, but at times that is not possible. * * *
>
> * * * * *
>
> And then Mr. Cash makes an observation that Mr. McClanahan didn't even know those veterans, and I think that is a very interesting observation and it points

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an instruction would be justified only if evil motive were an element of the crime, the evidence presented by petitioner did not warrant such an instruction. His testimony on this point was merely that he told his attorney that he was interested in buying houses from veterans who had *already* procured G. I. loans on them. Such a plan of operation was entirely different from that disclosed by the record in this case and any advice based on that set of facts is not indicative of petitioner's good faith.

up to a good extent the why of Mr. McClanahan's name in this indictment instead of, say, veteran Pribble or Mr. Skinner or one of these other people. Because there is the top dog, gentlemen, as the old expression is. There is the top dog. * * *

* * * * *

But going a little further about Mr. Jarrard, he is supposedly the man behind this whole scheme. Where is Mr. Jarrard? If he is Mr. McClanahan and Mr. Fitzhenry's alibi in this case, why wasn't he up on this stand to tell you that, gentlemen, "I made an honest mistake about a technicality of the law and I told these people that they should just go right out there and give these veterans five hundred dollars to put their name on the paper."

The defendants in this case have the subpoena power if that is their alibi.

Mr. CASH. I am going to object to that. I am going to ask for a mistrial on the basis of this reference, the impression of testimony before the jury and the question of that sort is highly prejudicial.

The COURT. Overruled.

* * * * *

In the context of evidence that petitioner, as financier, was a central figure in the venture, the court below properly found that the characterization of petitioner "did not go beyond proper comment and no harm resulted" (Pet. App. 32). See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 237–243; *Dunlop* v. *United States*, 165

U. S. 486, 498; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637–638 (C. A. 2), certiorari denied, 329 U. S. 742; *Chadwick* v. *United States*, 117 F. 2d 902, 905 (C. A. 5), certiorari denied, 313 U. S. 585.

Equally within the bounds of fair comment on the evidence were the United States Attorney's remarks on petitioner's failure to call Mr. Jarrad, petitioner's counsel, as a witness. It was petitioner who injected the attorney into the case, claiming that he relied on the legal advice given him. It would therefore be part of his case to call the witness to bolster his defense. His failure to do so could properly be the subject of an unfavorable inference. See *Graves* v. *United States*, 150 U. S. 118, 120; *United States* v. *Carter*, 217 U. S. 286. And the prosecutor was fully entitled to point out the weakness of the unsubstantiated claim.[5]

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[5] Petitioner argues that the comment was unfair because the attorney was under indictment for the same type of offense (Pet. 15). But the attorney was nevertheless available as a witness, and petitioner knew of the indictment when he chose to present the picture of himself as a person relying in good faith upon the advice of a disinterested attorney. The failure to call the attorney was therefore a proper subject of comment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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